Supreme Court, U.S.
FILED

No. 091094 MAR 10 2010

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In The

Supreme Court of the United States

CHARLES MELVIN CAMPBELL, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001), the Fourth Circuit held that 18 U.S.C. § 924(c)(1)(A)(i) requires a consecutive five-year minimum mandatory sentence to be imposed even when the defendant is also subject to a higher minimum mandatory sentence for a conviction drug trafficking offense in the same indictment. The Second Circuit took a contrary position in *United States v. Williams*, 558 F.3d 1666 (2nd Cir. 2009). The question presented in this case is whether the Second Circuit's interpretation of the statute is correct.

II. Whether the enforceability of appellate waiver provisions in federal plea agreements should be analyzed within the framework announced by the Tenth Circuit in *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004), which provides that appellate waivers should not be enforced if doing so would result in a miscarriage of justice, as opposed to the Fourth Circuit's approach which requires enforcement upon a mere finding that the waiver was entered knowingly and voluntarily.

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Charles Melvin Campbell, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Decision of the court below is not published. The order of the Fourth Circuit dismissing Appellant's appeal based on the appeal waiver provision contained in his plea agreement is attached as App. 14.

JURISDICTION

The Court of Appeals affirmed Mr. Campbell's conviction and sentence by dismissing Mr. Campbell's appeal on December 10, 2009. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 924(c)(1)(A) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug

trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentence to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentence to a term of imprisonment of not less than 10 years.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides that "No person shall be held to answer for a . . . crime, unless upon a presentment or indictment of a Grand Jury" and that a criminal defendant is entitled to "due process of law."

STATEMENT OF THE FACTS

Petitioner Campbell entered a guilty plea in the United States District Court for the Eastern District of North Carolina, Raleigh Division, on August 25, 2008, to Conspiracy to possess with intent to distribute more than fifty grams of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846 and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). His negotiated plea agreement contained an appeal waiver. On April 20, 2009, the district court sentenced Petitioner to two-hundred-sixty-two (262) months imprisonment on Count One and sixty (60) months imprisonment on Count Nine, to run consecutively to the sentence imposed on Count One, for a total of three-hundred-twenty-two (322) months incarceration.

Petitioner appealed his sentence to the Fourth Circuit, arguing that: 1) Petitioner did not knowingly, voluntarily, and intelligently waive his right to appeal; 2) that the unconstitutional manner in which Petitioner's sentence was imposed precluded enforcement of the sentencing appeal waiver provision of the plea agreement; 3) that the district court imposed a sentence that was procedurally and substantively unreasonable; and 4) that the five (5) year consecutive minimum mandatory for the firearm was not applicable because of the ten (10) year minimum mandatory on the drug trafficking crime.

The Government moved to dismiss the appeal based on the appeal waiver language contained in the

plea agreement. Petitioner objected to the dismissal. The Fourth Circuit dismissed Petitioner's appeal based on the appeal waiver contained in his plea agreement. This petition followed.

REASONS FOR GRANTING THE PETITION

The writ should be granted on both grounds pursuant to Supreme Court Rule 10(a) and (c) because the decision in the Fourth Circuit conflicts with the decisions of another circuit. In the first issue there is a conflict between the Fourth Circuit in *United States v. Studifin*, 240 F.3d 415, 422 (4th Cir. 2001), and the Second Circuit in *United States v. Williams*, 558 F.3d 166 (2nd Cir. 2009).

In the second issue the conflict is between the Tenth Circuit in *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004), and the Fourth Circuit's handling of appeal waivers, as in *United States v. Davis*, 954 F.2d 182 (4th Cir. 1992). Both issues involve an important federal question that has not been, but should be settled by this court. Gun charges make up a significant proportion of charges brought in federal court and appeal waivers are universally used in the resolution of federal cases.

I. 18 U.S.C. § 924(c)(1)(A)(i) Does Not Require A Consecutive Five-Year Minimum Mandatory Sentence When The Defendant Is Also Subject To A Higher Minimum Mandatory Sentence In Light Of His Simultaneous Conviction For A Drug Trafficking Offense.

A. Introduction

Certiorari has been granted on this question in *Abbott v. United States*, 09-479, and *Gould v. United States*, 09-7073, and the cases consolidated for argument. Orders list, January 25, 2010, 590 U.S. ___. In *Abbott v. United States*, 09-479, the questions are: (1) Whether the term "any other provision of law" of 18 U.S.C. § 924(c) includes the underlying drug trafficking offense or crime of violence; and (2) if not, whether it includes another offense for possessing the same firearm in the same transaction. In *Gould v. United States*, 09-7073, the question is: Does a mandatory minimum sentence provided by 18 U.S.C. § 924(c)(1)(A) apply to a count when another count already carries a greater mandatory minimum sentence? Because the issue in *Gould* is the same as the issue raised by Petitioner herein, Mr. Campbell requests that the decision in his case be stayed until the decisions in *Abbott* and *Gould*.

B. The Circuit Split

In *United States v. Whitley*, 529 F.3d 150 (2nd Cir. 2008), the Second Circuit interpreted the introductory "except" clause of 18 U.S.C. § 924(c)(1)(A). This subsection provides in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentence to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentence to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

In *Whitley*, the defendant was convicted of committing three offenses stemming from an armed robbery: (1) Hobbs Act, 18 U.S.C. § 1951, violation, which does not contain a mandatory minimum penalty; (2) an Armed Career Criminal Act violation under 18 U.S.C. §§ 922(g)(1), 924(e), for being a felon in possession of a firearm after being convicted of three prior offenses, for which the minimum sentence was fifteen years; (3) a § 924(c) offense for discharging a firearm in relation to a crime of violence, for which the minimum penalty was a consecutive ten year penalty under (1)(A)(iii). The Second Circuit concluded that the consecutive minimum ten year penalty under § 924(c) did not apply because a higher fifteen-year minimum was imposed by the Armed Career Criminal Act. The Second Circuit held that the "'except' clause of § 924(c) 'means what it literally says' – that the minimum sentences it requires do not apply where 'a greater minimum sentence is other provided by . . . any other provisions of law.'"

Soon after, in *United States v. Williams*, 558 F.3d 1666 (2nd Cir. 2009), the Second Circuit examined the same provision in the context of an underlying drug trafficking offense which carried a ten year penalty under 21 U.S.C. § 841(b)(1)(A). Williams was charged under 924(c)(1)(A)(i). Citing *Whitley*, *supra*, and *United States v. Rodriguez*, ___ U.S. ___, 128 S.Ct. 1783, 1788-89 (2008), the Williams Court decided that the plain language of the statute, the

statutory scheme, and the legislative history of the statute supported its conclusion that Williams was not subject to a mandatory minimum sentence five years for possession of a firearm in furtherance of drug trafficking crime in light of the ten year mandatory minimum on the 21 U.S.C. § 841 count.

In contrast, the Fourth Circuit, like six other Circuits, has held that the statutory language "any other provision of law" does not include predicate crimes. *See United States v. Studifin*, 240 F.3d 415, 423-24 (4th Cir. 2001); *United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009) (citing *United States v. Collins*, 205 Fed. Appx. 196, 198 (5th Cir. 2006)); *United States v. Easter*, 553 F.3d 519, 525 (7th Cir. 2009); *United States v. Parker*, 549 F.3d 5, 11-12 (1st Cir. 2008); *United States v. Jolivette*, 257 F.3d 581, 586-87 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 386 (8th Cir. 2000); *United States v. Segarra*, 582 F.3d 1269, 1272-73 (11th Cir. 2009).

These courts of appeals have rested their holdings on either the supposed congressional purposes or the sparse legislative history behind the clause, ignoring the plain language of the statute. Some courts have reasoned that applying the "except" clause to predicate offenses would contravene Congress's assumed aim to increase sentences for drug trafficking and violent crimes. *Easter*, 553 F.3d at 526; *Studifin*, 240 F.3d at 423; *Alaniz*, 235 F.3d at 389-90. Some

have held that counting predicate offenses as "any other provision of law" would make § 924(c) a sentence enhancement instead of a stand-alone crime. *Easter*, 553 F.3d at 526; *Segarra*, 582 F.3d at 1273 (citing *Easter*).

Under the authority of *United States v. Rodriguez*, *supra*, because the plain language of the statute supports the Second Circuit's position, Petitioner was not subject to a mandatory minimum sentence five years for possession of a firearm in furtherance of drug trafficking crime in light of the ten year mandatory minimum applicable to Petitioner's conviction on Count one, the § 841 count.

II. The Enforceability Of Appeal Waiver Provisions In Federal Plea Agreements Should Be Analyzed In Accordance With The Principles Announced In The Tenth Circuit's Decision In *United States v. Hahn*, Which Provides That Appeal Waivers Should Not Be Enforced If Doing So Would Wrought A Miscarriage Of Justice, As Opposed To The Fourth Circuit's Approach Requiring Enforcement Of The Appeal Waiver Upon The Mere Finding That The Waiver Was Entered Knowingly And Voluntarily.

A. Introduction.

The writ should be granted pursuant to Supreme Court Rule 10(a) and (c) because (1) the decision in

United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004), conflicts with the Fourth Circuit's handling of appeal waivers in *United States v. Davis*, 954 F.2d 182 (4th Cir. 1992), relied upon by the government in the instant case, and (2) it involves an important federal question that has not been, but should be settled by this court.

B. The Circuit Split – the Tenth Circuit Approach in *United States v. Hahn*.

In *Hahn*, the court explained that contract principles govern plea agreements, but that a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court. The *Hahn* Court further explained that, "appellate waivers benefit the government by saving the costs of prosecuting appeals, and '[o]nly through the efficient dismissal of an appeal will the government receive the benefit of its bargain.'" *Id.* citing *United States v. Elliot*, 264 F.3d 1171, 1173-74 (10th Cir. 2001). The *Hahn* Court then announced that in accordance with the principles described above, the following analysis applies to the enforceability of an appellate waiver:

(1) whether the disputed appeal falls within the scope of the waiver of appellate rights;

(2) whether the defendant knowingly and voluntarily waived his appellate rights; and

(3) whether enforcing the waiver would result in a miscarriage of justice, as defined by the court.

The *Hahn* Court explained the miscarriage of justice exception to the enforcement of the appellate waiver as including situations:

(1) where the district court relied on an impermissible factor such as race;

(2) where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid;

(3) where the sentence exceeds the statutory maximum, or

(4) where the waiver is otherwise unlawful – further defined in accordance with the test employed in *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993) (plain error is error seriously affecting the fairness, integrity or public reputation of judicial proceedings).

Hahn, *id.* at 1327.

C. Fourth Circuit Approach.

In contrast, the Fourth Circuit upholds the enforcement of appeal waivers solely on the basis of whether they have been knowingly and voluntarily entered. *See Davis*, 954 F.2d at 186. *Hahn* is the proper analysis for several reasons. Most importantly, although this Court has not addressed this precise

issue, the Tenth Circuit's reluctance to enforce appellate waivers in cases where a miscarriage of justice is wrought – within the meaning of the plain error test announced by this Court in *United States v. Olano*, 507 U.S. 725, 732 (1993), is consistent with this Court's body of jurisprudence regarding waivers.

D. Supreme Court Jurisprudence.

A close examination of several Supreme Court cases regarding the enforceability of different types of waivers of a right (both statutory and constitutional rights) reveals that more is required for a decision in favor of enforcement of a waiver of this important statutory right than the mere finding that a waiver is knowing and voluntary. In its waiver jurisprudence, this Court has consistently and carefully considered the nature of the right being waived, its connection to the system as a whole; and therefore, whether the waiver of the right should be enforced. In sum, the cases presume that statutory rights can be waived; but such a presumption can be rebutted upon a showing that Congress either explicitly or implicitly did not intend for a waiver of the right in question. An implicit showing can be established upon a showing that something about the structure, and/or legislative history of an act which evinces a specific legislatively policy of preventing private waivers of the right in question. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S.Ct. 895 (1945).

In *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187 (1987), this Court decided that the waiver of a private right (waiving a civil rights action in exchange for dismissal of pending charges) was subject to public policy considerations. In that case, the Sixth Circuit had ruled that such agreements were *per se* invalid. The Supreme Court reversed after conducting an examination of whether the enforcement of the agreement would adversely affect the relevant public interests.

In *United States v. Mezzanatto*, 513 U.S. 196, 115 S.Ct. 797 (1995), this Court again had the opportunity to examine the enforceability of a waiver. This time the issue was whether the waiver of the exclusionary provisions of plea-statement rules were enforceable in light of the potential for prosecutorial abuse. In that case, the Court decided that the Ninth Circuit's *per se* rejection of waivers was improper, and instead, directed appeals courts to conduct a case-by-case inquiry into whether the waiver was the product of fraud or coercion. Presumably, a waiver procured in this manner would not be enforceable because of public policy concerns. The resolution of the *Mezzanatto* case appeared to turn on whether or not Congress intended the provisions of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) waivable. *See id.*, 513 U.S. at 200, 115 S.Ct. 801. Concluding that there was a presumption of statutory waivability, the *Mezzanatto* Court reversed the Ninth Circuit *per se* approach.

However, the *Mezzanatto* Court also examined the nature of the right sought to be waived in order to

determine whether Congress had addressed the waivability of the right. Additionally, the *Mezzanatto* Court noted that unlike *Brooklyn Savings Bank v. O'Neil, supra,* relied upon by the Ninth Circuit, *Mezzanatto* had identified "nothing in the structure or history of the plea-statement Rules that suggest that they were aimed at preventing private bargaining; in fact, the Rules adopt a contrary view." *Mezzanatto*, 513 U.S. at 206 fn 4, 115 S.Ct. 804 fn 4. The *Mezzanatto* Court specifically noted:

> [w]e need not decide whether and under what circumstances substantial 'public policy' interests may permit the inference that Congress intended to override the presumption of waivablility, for in this case there is no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining.

Id. at 207. Thus, *Mezzanatto* did not answer the question of whether broad appeal waivers should be enforced. Here, Petitioner contends that the structure and legislative history of the sentencing guidelines, which expanded the scope of federal sentencing appeals under 18 U.S.C. § 3742, supports the contention that the right to appeal is a structural part of the guidelines which is vital to the goal of reducing unwarranted sentencing disparity.

The most recent waiver case decided by this Court also did not address the precise issue presented by the enforcement of the type of broad appellate waiver presented by Petitioner's case. In *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450 (2002), the issue raised was whether the provision of a plea agreement requiring the defendant to waive her right to receive impeachment information prior to entering a plea agreement and the right to receive information regarding any "affirmative defenses" she would raise, violated the Constitution. Again, the issue turned on an assessment regarding the nature of the right sought to be waived, and whether enforcement was *systemically* beneficial. In *Ruiz*, this Court examined whether the Ninth Circuit's holding that a guilty plea could not be "voluntary" unless prosecutors first disclosed evidence related to impeachment and affirmative defenses was correct. Again, this Court demonstrated its hostility to presuming that a right was not waivable, but carefully assessed the facts to determine whether the waiver there *should* be enforced.

E. Broad Appellate Waivers Should Not Be Enforced Because They Undermine the Structure and Constitutionality of the Federal Sentencing Guidelines.

Petitioner contends that this Court should consider the enforcement of appellate waivers, without considering any underlying issues, as harmful to the overarching purpose of the federal sentencing

guidelines system. As in Petitioner's case, federal prosecutors across the country are demanding that defendants waive both their right to appeal a sentence or collaterally attack a conviction as part of negotiated plea agreements, often regardless of whether the guidelines are calculated or applied correctly. The inclusion of appellate waivers in plea agreements began to be more widespread approximately ten years ago, after a 1995 memorandum authored by John C. Keeney, Acting Assistant Attorney General, and circulated to United States Attorneys, which encouraged the uses of appellate and collateral waivers in the plea negotiation. (*See* "Reflections on a Hobson's Choice: Appellate Waivers and Sentencing Guidelines," *Federal Sentencing Reporter*, Vol. 11, No. 1, July/August 1998, p. 60.) While the Keeney memorandum suggested that appellate waivers are useful only in certain appropriate cases, many prosecutors nevertheless require defendants to waive the right to appeal as part of a plea agreement. In some districts waiver of appeal is a condition precedent to consideration for substantial assistance motions pursuant to U.S.S.G. § 5K1.1.

Broad appellate waivers such as the waiver in this case do irreparable harm both to individual defendants and to the sentencing guidelines. *United States v. Perez*, 46 F.Supp. 59, 68 (D.Mass. 1999) ("The result of a general pattern of appeals waivers would be a return to a regime in which the disparities Congress sought to eliminate [with the passage of the sentencing guidelines] could go generally unchecked.")

The ultimate goal of the sentencing guidelines was to promote an effective and fair sentencing system. To effectuate this goal, the Sentencing Commission sought to establish a sentencing system that is honest and ensures reasonable uniformity and proportionality. U.S.S.G. Chapter One, Pt. A, subpart 3. The sentencing guidelines marked a turning point for appellate courts in America by providing for the first time a statutory mechanism by which a criminal sentence could be appealed to a higher court, whether or not the sentence fell within the statutory maximum sentence. Petitioner maintains that the appellate process is absolutely critical to achieving and maintaining of the stated goals of Act. As the Sentencing Commission itself notes, "[T]he Commission is a permanent body that can amend the guidelines each year." U.S.S.G. Chapter One, Pt. A, subpart 5. The Commission gathers information on appeals regarding sentencing issues, both published and unpublished. For instance, in the year 2000, the Commission gathered information on 6,381 appellate court cases of which 2,341 were "conviction only" cases. United States Sentencing Commission, 2000 Sourcebook of Federal Sentencing Statistics, p. iv. To utilize waivers to deny the appellate courts the opportunity to fully examine novel and important sentencing issues seriously undercuts the ability of the U.S. Sentencing Commission to achieve its mission of amending and updating the guidelines in accordance with constitutional principles.

Subsection 3742 of Title 18 serves two purposes: to protect individual litigants and to ensure the collective integrity of the sentencing guidelines. In 1991, four years after the guidelines became effective, the Commission issued a Report finding that the "innovation of sentence appellate review, while no doubt imposing additional burdens on court resources, apparently has functioned well to date . . . [t]he Commission has benefitted from this evolving body of appellate law and has begun to address significant inter-circuit conflicts in the guideline interpretation on a selective basis." United States Sentencing Commission, "The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration and Prosecutorial Discretion and Plea Bargaining," Vol. II, December 1991.

As noted above, a significant number of guidelines amendments are in response to evolving appellate case law.

This Court has recognized how important the evolving nature of the guidelines is to the framework of the Congressional sentencing policy. In *Braxton v. United States*, the Court noted:

> The Guidelines are of course implemented by the courts, so in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to

> the Guidelines conflicting judicial decisions might suggest. . . . In addition to the *duty* to review and revise the Guidelines, Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u).

Braxton v. United States, 500 U.S. 344, 489 (1991) (emphasis in original).

During her testimony, Sentencing Commission Chair Diana Murphy informed the members of the Criminal Justice Oversight Subcommittee of the Senate Judiciary Committee that the Commission resolved five circuit conflicts during the last amendment cycle and identified approximately forty remaining circuit conflicts. Written Statement of Judge Diana Murphy, Chair of the U.S. Sentencing Commission, *Federal Sentencing Reporter*, Vol. 13, No. 2, September/October 2000, p. 105. Commissioner Murphy went on to explain that "such conflicts threaten the uniform application of the guidelines throughout the nation, and elimination of unwarranted sentencing disparity is a cornerstone of the Sentencing Reform Act." *Id.* at 103. Obviously, reducing the pool of cases which can be appealed, does not reduce the problem of unwarranted disparity, it merely hides the problem. Without the appellate process, the sentencing guidelines will be unable to achieve the laudable goals of the sentencing

guidelines as enumerated both by Congress and the Sentencing Commission.

Broad appellate waivers such as the one present in this case are inconsistent with the underlying objective of the sentencing guidelines. As the Federal Public Defender for the Western District of Washington observes, "[b]y reserving for itself the exclusive right to appeal, the government does more than interfere with the development of the sentencing law, it attempts to control that process." [Letter from Thomas Hillier II, Federal Public Defender, Western District of Washington, on behalf of Federal Public and Community Defenders on proposed amendment to Federal Rule of Criminal Procedure Rule 11(c), to Peter G. McCabe, Secretary, Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, dated February 17, 1998].

The problem of systemic distortion arises from the fact that most appellate waivers, including the one in Petitioner's case, are one-sided, that is the defendant waives appellate rights and the government does not. Compare *United States v. Rosa*, 123 F.3d 94 (2nd Cir. 1997) (refusing to enforce a waiver of appeal provision which did not specify a sentence or range of sentences) with the broad waiver provisions which were enforced in *United States v. Benitez-Zapata*, 131 F.3d 1444, 1446 (11th Cir. 1997).

F. The Plea Agreement Is an Unenforceable Contract Because of the Failure of Consideration.

Plea Agreements are construed according to contract law principles. In *Santobello v. New York*, 404 U.S. 257, 257-58, 262 (1971), the Supreme Court explicitly applied contract principles to plea bargaining in ruling that the prosecutor's failure to keep its promise regarding a sentencing recommendation entitled the defendant to a new trial. Contract principles have been specifically held to apply to appeal waivers contained in plea agreements. *United States v. Ready,* 82 F.3d 551, 558 (2nd Cir. 1996); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986).

The plea agreement in the instant case is unenforceable because of a failure of adequate consideration. It is "horn book" law taught to every first year law student that in order to be enforceable, an agreement must be in return for adequate consideration. In the instant case the promises by the Government were illusory because they were required by the state of the evidence and/or had no effect on the sentence. For instance, Petitioner had clearly accepted responsibility and the dismissal of two counts of the indictment had no meaningful effect on the ultimate sentence because of the grouping rules and relevant conduct considerations under the federal sentencing guidelines. "A promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party." *Burton v. Kenyon*, 264 S.E.2d 808, 809

(N.C. App. 1980); *Haynes v. B & B Realty Group, LLC*, 633 S.E.2d 691, 695 (N.C. App. 2006).

In the instant case, Petitioner pled guilty to two counts of the indictment and agreed to waive most of his rights to appeal. The Government, in turn, made no concessions not required by the evidence known to it. The dismissal of two counts of the indictment made no difference in the ultimate sentence. Thus, under the circumstances of the case, the benefits to Petitioner were illusory.

Since the terms of the waiver expressly admit that the government recommendation is not binding on the court, this only further demonstrates the illusory nature of the agreement. The net effect of the agreement was an absence of consideration, or at the very least inadequate consideration, to create a binding agreement. While courts have analyzed plea agreements as analogous to contracts, there has also been recognition that a plea agreement is not an ordinary contract in light of important "constitutional and supervisory concerns." *United States v. Giorgi*, 840 F.2d 1022, 1026 (1st Cir. 1988), quoting *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985).

This Court has held that a guilty plea is valid if entered knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). This landmark precedent was the genesis for Federal Rule of Criminal Procedure Rule 11. Rule 11 prescribes the advice which the court must give to insure that the

defendant who pleads guilty has made an informed plea. The requirements of Rule 11 are designed to insure, as much as possible, that the defendant validly waived his constitutional rights by his guilty plea *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166 (1969).

The Advisory Committee Note states that "Subsection (c) (now found at Rule 11(b)(1)), retains the requirement that the court address the defendant personally." Citing, *McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S.Ct. 1166 (1969). Further, this Court has stated, that for a defendant's waiver to be valid, it must be "an intentional relinquishment or abandonment of a *known* right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938). Rule 11 was amended in 1999 to require that the district court inform the defendant and ensure that the defendant understands "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." The Advisory Committee notes relating to this section states as follows:

> Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was

> important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.

The 2002 amendment as it relates to appellate waivers merely moved the language previously included in the 1999 amendment to a new section, and is now found at Rule 11(b)(1)(N). Rule 11 requires that the Court inform the defendant of, and ensure that the defendant understands, the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

Instead, in Petitioner's case, the court did not actually refer to a sentencing appeal waiver, but rather referred to the provision in a shorthand manner, as "a right to appeal," in a sentence outlining the provisions of the plea agreement very tersely. In the next breath the court mentioned giving up trial rights. The manner in which the district court included the waiver of appeal, just prior to informing Appellant that he gave up his trial rights, suggested that the waiver of his right to appeal was connected with his waiver of his trial rights. By not specifically stating that the appeal waiver applied to the sentence imposed, the district court failed to comply with the plain language of Rule 11(b)(1)(N).

The statements by the district court do not facially inform the defendant of the terms of the appellate waiver. The district court did not explain what the rights are encompassed by the statutory right to appeal under 18 U.S.C. § 3742(a), which provides for an appeal by notice under three circumstances: if the sentence was (1) imposed in violation of law; (2) imposed as a result of an incorrect application of the sentencing guidelines; or (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than established in the guideline range, or includes a more limiting condition of probation or supervised release under § 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. The district court did not explain any of these circumstances to Petitioner.

The district court likewise did not inform Petitioner regarding the nature of a collateral attack or of a post-conviction proceeding. The district court did not explain the term upward departure, which would entitle Petitioner to an appeal, or any other terms which would ensure that Petitioner understood he was giving up the right to allow an appellate court to review guideline adjustments which were not technically "upward departures" as defined by the sentencing guidelines.

The district court's statement in Petitioner's case fails to adequately inform him what appellate rights he had under the statute, and did not inform him that he was giving up almost all of those rights. Petitioner's monosyllabic response of "Yes," in reply to the question, "Is that what you have agreed to," does not demonstrate that he understood the rights he was giving up. The record does not otherwise demonstrate that Petitioner had any independent understanding regarding the rights he was waiving. Given these facts, the district court's plea colloquy was insufficient to ensure that the waiver was knowing and voluntarily made.

CONCLUSION

For the above enumerated reasons, Petitioner's plea colloquy simply did not comply with the plain terms of Rule 11(b)(1)(N). Longstanding precedent of this Court requires reversal under the circumstances. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838 (1997) (Release signed by employee as part of termination agreement, but did not comply with Congressional requirements, could not bar her

claim). Consequently, Mr. Campbell's sentence must be vacated and his case remanded.

Respectfully submitted,

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Attorneys for
Charles Melvin Campbell, Jr.
Petitioner

FILED: December 10, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4434
(7:08-cr-00054-BO-2)

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

CHARLES MELVIN CAMPBELL, JR.,

Defendant – Appellant.

ORDER

Charles Melvin Campbell, Jr., seeks to appeal his sentence. The Government has moved to dismiss the appeal as barred by Campbell's waiver of the right to appeal included in the plea agreement. Upon review of the plea agreement and the relevant portions of the transcript of the Fed. R. Crim. P. 11 hearing, we conclude that Campbell knowingly and voluntarily waived his right to appeal his sentence, with exceptions not here present, and that the sentencing claims Campbell raises fall within the scope of the appeal waiver. Accordingly, we grant the Government's motion to dismiss.

Entered at the direction of Judge Agee, with the concurrence of Judge Michael and Judge Shedd.

FOR THE COURT

/s/ Patricia S. Connor
Clerk

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA

V.

Charles Melvin Campbell, Jr.

JUDGMENT IN A CRIMINAL CASE

Case Number: 7:08-CR-00054-2BO

USM Number: 51184-056

H. Gerald Beaver
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 and 9

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846	Conspiracy to distribute and possess with intent to distribute more than 50 grams of cocaine base (crack).	5/22/2008	1
18 U.S.C. § 924(c)	Possession of a firearm in furtherance of a drug trafficking crime.	5/22/2008	9

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) 8 and 10 ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Sentencing Location:
Raleigh, NC

4/20/2009
Date of Imposition of Judgment

/s/ Terrence W. Boyle
Signature of Judge

TERRENCE W. BOYLE,
U.S. District Judge
Name and Title of Judge

4/20/2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Ct. 1 – 262 mos.
Ct. 9 – 60 mos. and shall run consecutive to Ct. 1.
The defendant shall receive credit for time served.

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends FCI Butner for incarceration.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Ct's 1 and 9 – (5 yrs. per count) – concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☑ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4. The defendant shall support the defendant's dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10. The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addition, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 200.00**	**$**	**$**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement
$ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payment of the special assessment shall be due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:08-CR-54-2BO

UNITED STATES OF AMERICA	)	**MEMORANDUM OF PLEA AGREEMENT**
v.	)	(Filed Aug. 25, 2008)
CHARLES MELVIN CAMPBELL, JR.	)	

The United States of America ("Government"), by and through the United States Attorney for the Eastern District of North Carolina ("USA-EDNC"), and the Defendant, CHARLES MELVIN CAMPBELL, JR., with the concurrence of the Defendant's Attorney, Gerry Beaver, have agreed that the above-captioned case should be concluded in accordance with this Memorandum of Plea Agreement as follows:

1. This Memorandum constitutes the full and complete record of the Plea Agreement. There are no other agreements between the parties in addition to or different from the terms herein.

2. The Defendant agrees:

a. To plead guilty to Counts One and Nine of the Indictment herein.

b. To make restitution to any victim in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 3663 and 3663A.

Said restitution shall be due and payable immediately.

c. To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

d. To knowingly and expressly waive any and all rights, under the Fifth and Sixth Amendments to the United States Constitution and any cases interpreting them, to have the existence and applicability of any prior convictions (1) charged by indictment, (2) submitted to a jury, and (3) proved beyond a reasonable doubt. The defendant hereby consents to having the existence and applicability of any such convictions decided by the sentencing judge based on a preponderance of the evidence. The defendant reserves the right to contest at sentencing the existence of

any such prior conviction and whether such conviction qualifies to increase the statutory minimum and maximum sentence, but consents to the resolution of any such objection by the sentencing judge using a preponderance-of-the-evidence standard.

e. To waive all rights, whether asserted directly or through a representative, to request or receive from the United States any records pertaining to the investigation or prosecution of this matter, except as provided in the Federal Rules of Criminal Procedure. This waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.

f. To pay a special assessment for each count to which the defendant pleads guilty, pursuant to the provisions of 18 U.S.C. § 3013. The assessment shall be paid by the Defendant at sentencing. The Defendant or Defendant's counsel shall provide a check in payment of the said assessment directly to the Clerk, U.S. District Court/EDNC.

g. To assist the Government in the recovery and forfeiture of any assets which facilitated and/or were acquired through unlawful activities, including all such assets in which the defendant has any interest or control.

h. To complete and submit, if requested, a financial statement under oath to the Office of the USA-EDNC no later than two weeks after the entry of the guilty plea.

i. To abide by any conditions of release pending sentencing and report timely for service of sentence.

j. Whenever called upon to do so by the United States, (1) to disclose fully and truthfully in interviews with Government agents information concerning all conduct related to the Criminal Information and any other crimes of which the Defendant has knowledge, and (2) to testify fully and truthfully in any proceeding. These obligations are continuing ones. The Defendant agrees that all of these statements can be used against the Defendant at any judicial proceeding, including trial and sentencing, if the Defendant withdraws from this plea agreement or is allowed to withdraw the guilty plea.

k. If the Defendant provides false, incomplete, or misleading information or testimony, this would constitute a breach of this Agreement by the Defendant, and the Defendant shall be subject to prosecution for any federal criminal violation. Any information provided by the Defendant may be used against the Defendant in such a prosecution.

l. To submit to a polygraph examination whenever requested by the Office of the USA-EDNC. The results of these examinations will be admissible *only* at the Defendant's sentencing, and at any hearing as to whether there has been a breach of this agreement. The Government may rely on these results in determining whether the Defendant has

fulfilled any obligation under this Agreement.

3. The Defendant understands:

a. That as to the counts of the Indictment to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

Count One:

(1) Charge: Conspiracy to distribute more than 50 grams of cocaine base (crack)

(2) Code section violated: 21 U.S.C. § 846

(3) Elements:

First: From on or about July 19, 2007, the exact date being unknown to the grand jury, and continuing until on or about May 28, 2008, the Defendant and others agreed to distribute more than fifty grams of cocaine base (crack);

Second: the Defendant knew of the unlawful purpose of the agreement;

Third: the Defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose.

(4) Maximum term of imprisonment: life

(5) Minimum term of imprisonment: 10 years.

(6) Maximum term of supervised release: 5 years.

(7) Minimum term of supervised release: 5 years

(8) Maximum term of imprisonment upon revocation of supervised release: 5 years

(9) Maximum fine: $4,000,000.

(10) Restitution pursuant to 18 U.S.C. §§ 3663 and 3663A, and as agreed to in Paragraph 2.b. above.

(11) Special assessment: $100.

Count Nine:

(1) Charge: Possession of a firearm in furtherance of a drug trafficking crime

(2) Code Section violated: 18 U.S.C. § 924(c)

(3) Elements:

First: The Defendant knowingly possessed a .40 caliber Glock pistol on or about March 18, 2008;

Second: the firearm traveled in interstate commerce; and

Third: the Defendant possessed the firearm in furtherance of a drug trafficking crime.

(4) Maximum term of imprisonment: life

(5) Minimum term of imprisonment: 5 years

(6) Maximum term of supervised release: 5 years

(7) Minimum term of supervised release: 5 years

(8) Maximum term of imprisonment upon revocation of supervised release: 5 years

(9) Maximum fine: $250,000

(10) Restitution pursuant to 18 U.S.C. §§ 3663 and 3663A, and as agreed to in Paragraph 2.b. above.

(11) Special assessment: $100.

Total Statutory Maximum Sentence: life imprisonment plus life imprisonment, 5 years supervised release, $4,250,000 fine, $200 special assessment.

b. That any sentence imposed will be without parole.

c. That the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.

d. That, unless Defendant is found unable to pay, the Court will impose a fine, and failure to pay it will subject Defendant to additional

criminal and civil penalties pursuant to 18 U.S.C. §§ 3611-14.

4. The Government agrees:

a. At sentencing, it will dismiss Counts Eight and Ten of the Indictment.

b. That it reserves the right to make a sentence recommendation.

c. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions or objections filed by the Defendant.

d. That the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Criminal Information; however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.

e. That it will make known to the Court at sentencing the full extent of the Defendant's cooperation, but the Government is not promising to move for departure pursuant to U.S.S.G. §5K1.1, 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35.

f. Pursuant to U.S.S.G. §1B1.8, that self-incriminating information provided by the Defendant pursuant to this Agreement shall not be used against the Defendant in determining the applicable advisory Guideline range, except as provided by §1B1.8 and

except as stated in this Agreement. The Government will not, however, withhold from the United States Probation Office any evidence concerning relevant conduct.

5. The parties agree to the following positions as to the below-listed sentencing factors only, which are not binding on the Court in its application of the advisory Guideline range; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the Government is no longer bound to its positions as to those factors:

a. A downward adjustment for acceptance of responsibility is warranted under U.S.S.G. §3E1.1.

This the 6th day of June, 2008.

GEORGE E.B. HOLDING
United States Attorney

By: /s/ J Cowley
JASON H. COWLEY
Assistant United States Attorney
Criminal Division

/s/ Charles Melvin Campbell, Jr.
CHARLES MELVIN CAMPBELL, JR.
Defendant

/s/ Gerry Beaver
Gerry Beaver
Attorney for the Defendant

APPROVED, this day 25 of August 2008.

/s/ Terrence W. Boyle
UNITED STATES DISTRICT JUDGE